# APPENDIX

## APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

Chicago, Illinois 60604

June 25, 1973

(Argued April 25, 1973)

Before

Honorable JOHN S. HASTINGS, *Senior Circuit Judge*

Honorable LEONARD P. MOORE, *Senior Circuit Judge**

Honorable THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA and SIMON LEVIN, Special Agent, Internal Revenue Service,

*Petitioners-Appellees,*

No. 72-1771 *vs.*

WILLIAM ZENOFF, as President of KREMBS FURNITURE COMPANY, INC., as Secretary Treasurer of KREMBS FINANCE CORPORATION, as President of ZENOFF INNS, INC., and as President of ZENOFF INVESTMENT CORPORATION; KREMBS FURNITURE COMPANY, INC.; KREMBS FINANCE CORPORATION; ZENOFF INNS, INC.; and ZENOFF INVESTMENT CORPORATION,

*Respondents-Appellants.*

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Appeal from the United States District Court for the Western District of Wisconsin.

No. 72-C-225(W)

JAMES E. DOYLE, *Judge.*

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* The Honorable Leonard P. Moore, Senior Circuit Judge for the Second Circuit, is sitting by designation.

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UNITED STATES OF AMERICA and KEVIN E. NESTOR, Special Agent, Internal Revenue Service,
*Petitioners-Appellees,*

No. 72-1944 *vs.*

YVONNE ALVAREZ SCHENNAULT, A/K/A YVONNE ALVAREZ, as secretary CAPITAL ENTERPRIZE BUILDING CORP.; CAPITAL ENTERPRIZE BUILDING CORP.; and IRA BURMAN,
*Respondents-Appellants.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 C 1120
PHILIP W. TONE, *Judge.*

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These two appeals are from orders of the respective district courts enforcing Internal Revenue Service (IRS) summonses directed to appellants. The summonses were issued pursuant to § 7602 of the Internal Revenue Code of 1954 and were ordered enforced under §§ 7402(b) and 7604(a) of the Code, essentially identical statutes which grant district courts jurisdiction "by appropriate process to compel *** attendance, testimony, or production" of records sought by means of an IRS summons. The appeals were separately briefed and argued, but they present common questions of law, and we have elected to dispose of them in a single order.

In No. 72-1771, appellant Zenoff, in his capacity as an officer of the four appellant corporations, was summoned to appear before appellee Levin, an IRS Special Agent, to testify concerning the tax liability of the corporations for three successive years and to produce for inspection certain records of the corporations. He appeared as ordered

at the time and place specified in the summonses, but he refused either to testify or to produce the summoned records. When the Government and Agent Levin petitioned the district court to enforce the summonses, Zenoff resisted enforcement on several grounds. (1) That Zenoff's ownership interests in the corporations were so extensive that the summoned records were in effect his personal records, so that their compelled production would violate his rights under the Fourth and Fifth Amendments. (2) That Agent Levin's sole purpose in issuing the summonses was to gather evidence for use against Zenoff in some future criminal prosecution for violation of the tax laws, and that this purpose was evidenced by certain statements made by Agent Levin and other IRS agents and by the fact that the statute of limitations on assessment and collection of tax had expired for two of the three years in issue. (3) That the IRS already had full access to the summoned records and had inspected them, so that enforcement of the summonses would run counter to the prohibition of § 7605(b) of the Code against unnecessary duplication in the inspection of records.

After full argument by the parties, the district court made oral findings of fact and conclusions of law on the basis of which it enforced the summonses as they related to production of the records. The district court specifically declined to rule on whether Zenoff must answer questions propounded by Agent Levin. The Government did not appeal the district court's failure to compel Zenoff to testify and indicated on oral argument in this court that it has no need of Zenoff's testimony at this time.

In No. 72-1944, appellant Schennault, in her capacity as secretary of appellant Capital Enterprize Building Corp., was summoned to appear before appellee Nestor, likewise

an IRS Special Agent, to testify concerning the corporation's tax liability for five successive years and to produce certain of its records for inspection. Appellant Burman, who is variously described as attorney for Schennault and for the corporation and to whom Schennault had given actual custody of the summoned records, received an identical summons. Schennault and Burman appeared before Agent Nestor at the time and place specified in the summonses, and they also refused either to testify or to produce the summoned records. They resisted the enforcement petition filed by the Government and Nestor on several grounds. (1) That the summoned records related to property owned by Schennault and/or her husband individually and, as such, were not subject to compelled production by Schennault in her capacity as corporate secretary. (2) That Agent Nestor's purpose in issuing the summonses had been to gather evidence for use against Schennault in some future criminal prosecution for violation of the narcotics laws. Further, that the summonses had been issued for the benefit of the Federal Bureau of Investigation and of the Bureau of Narcotics and Dangerous Drugs (BNDD) and that the non-tax-related purpose of the inquiry was evidenced by the fact that the statute of limitations on assessment and collection of tax had expired for several of the years in issue. (3) That the testimony sought would violate Schennault's rights under the Fifth Amendment and the attorney-client privilege.

Appellants moved for prehearing discovery and were allowed to depose Agent Nestor for the purpose of determining "whether the purpose of the I.R.S. in issuing summonses was to obtain evidence for the prosecution of [appellants] for non-tax-related offenses." Appellants' motion to compel Agent Nestor to answer certain interroga-

tories concerning his communications with agents of BNDD was denied, and their subpoenas duces tecum requiring Agent Nestor and two of his superiors to produce certain documents from Government files were quashed.

After an evidentiary hearing (which included a lengthy examination of Agent Nestor) and full argument by the parties, the district court enforced the summonses and entered appropriate findings of fact and conclusions of law. The judgment order required only the production of records. No specific mention was made of the requested testimony, but the Government on appeal has not objected to the omission.

The able district judges whose orders are appealed from were not clearly mistaken in holding that all the records sought are corporate records. Insofar as the records might tend to incriminate the corporate appellants, the corporations have no Fifth Amendment right to resist their production.[1]

Insofar as the records might tend to incriminate the individual appellants, the fact that the records are corporate prevents the individuals, regardless of the extent of their ownership interests in the corporations, from asserting

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[1] *Curcio* v. *United States*, 354 U.S. 118, 122 (1957); *Essgee Co.* v. *United States*, 262 U.S. 151, 155-156 (1923); *Wilson* v. *United States*, 221 U.S. 361, 382-384 (1911); *Hale* v. *Henkel*, 201 U.S. 43, 74-75 (1906); *United States* v. *Ellsworth*, 9 Cir., 460 F.2d 1246, 1248 (1972); *United States* v. *Bell*, 9 Cir., 448 F.2d 40, 41 n.1 (1971); *Benevolent & P.O. Elks, Lodge 615* v. *United States*, D. Minn., 352 F. Supp. 142, 145 (1972); *United States* v. *Lawhon*, S.D. Fla., 288 F. Supp. 669, 670 (1967).

whatever Fifth Amendment right they would otherwise have not to produce the records.[2]

It has long been established that an IRS summons does not violate the Fourth Amendment.[3]

The corporate form of the records disposes of the constitutional arguments, but it leaves for resolution the contentions based upon case law that the purpose of the IRS in undertaking the investigations in issue was improper and that its attempt to enlist judicial aid in furthering the investigations amounts to an abuse of the courts' process. The district courts here properly held that the decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971), controls.

Although *Donaldson* was concerned chiefly with the right of a taxpayer to intervene in an IRS investigation to prevent compliance by a third party with a summons issued for

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[2] *United States* v. *White*, 322 U.S. 694, 699 (1944); *Wilson* v. *United States*, 221 U.S. 361, 384-385 (1911); *United States* v. *Ellsworth*, 9 Cir., 460 F.2d 1246, 1248 (1972); *United States* v. *Bell*, 9 Cir., 448 F.2d 40, 41 (1971); *United States* v. *Held*, 6 Cir., 435 F.2d 1361, 1365-1366 (1970), cert. denied, 401 U.S. 1010 (1971); *United States* v. *Shlom*, 2 Cir., 420 F.2d 263, 265-266 (1969), cert. denied, 397 U.S. 1074 (1970); *United States* v. *Christiansen*, 3 Cir., 356 F.2d 986 (1966), cert. denied, 384 U.S. 962; *Wright* v. *Detwiler*, 3 Cir., 345 F.2d 1012 (1965); *Hair Industry, Ltd.* v. *United States*, 2 Cir., 340 F.2d 510, 511 (1965), cert. denied, 381 U.S. 950; *Wild* v. *Brewer*, 9 Cir., 329 F.2d 924, 925 (1964), cert. denied, 379 U.S. 914; *United States* v. *Theodore*, D.S.C., 347 F. Supp. 1070, 1072-1073 (1972); *United States* v. *Lawhon*, S.D. Fla., 288 F. Supp. 669, 670 (1967).

[3] *Donaldson* v. *United States*, 400 U.S. 517, 522 (1971); *First Nat'l Bank* v. *United States*, 267 U.S. 576 (1925), aff'g per curiam S.D. Ala., 295 F. 142 (1924); *United States* v. *Shlom*, 2 Cir., 420 F.2d 263, 266 (1969), cert. denied, 397 U.S. 1074 (1970).

the third party's records concerning the taxpayer, the dicta in Part VII of the opinion [*id.* at 531-536] were clearly intended to guide the lower courts in dealing with "abuse of process" objections to summons enforcement. The Court said an IRS summons may be issued (and, by implication, therefore, enforced) "in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." *Id.* at 536. Without deciding precisely when a recommendation for criminal prosecution can be said to have been made,[4] we think that the holdings in the instant cases that no such recommendations had been made were not clearly erroneous.

As far as the requirement of good faith is concerned, we read *Donaldson* (as the district courts here did and as the other courts which have considered the question have)[5] to say that so long as the determination of civil tax liability is *one* of the purposes for issuance of a summons, the test of good faith has been met. The findings in the instant cases

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[4] The Tenth Circuit has recently held that "a recommendation for criminal prosecution" within the meaning of *Donaldson* occurs when a case is referred by the IRS to the Department of Justice. *United States* v. *Billingsley*, 469 F.2d 1208, 1210 (1972), rev'g N.D. Okla., 331 F. Supp. 1091 (1971).

[5] *See, e.g., United States* v. *Cleveland Trust Co.*, 6 Cir., 474 F.2d 1234, 1236 (1973); *United States* v. *Wall Corp.*, D.C. Cir., 475 F.2d 893, 894-895 (1972); *United States* v. *Richardson*, 10 Cir., 469 F.2d 349, 352 (1972); *United States* v. *National State Bank*, 7 Cir., 454 F.2d 1249, 1251-1252 (1972); *United States* v. *Couch*, 4 Cir., 449 F.2d 141, 143 (1971), aff'd, 409 U.S. 322 (1973); *United States* v. *Troupe*, 8 Cir., 438 F.2d 117, 119 (1971). *See also United States* v. *Moriarty*, 7 Cir., 435 F.2d 347, 349 (1970), a pre-*Donaldson* case applying the same test.

that such determination was one of the purposes for issuance of the summonses were not clearly erroneous. "The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined." *United States* v. *Powell,* 379 U.S. 48, 58 (1964).

Statements by an IRS agent that the purpose of the investigation is the discovery of evidence of tax fraud for possible criminal prosecution are not inconsistent with a finding that the investigation also has a valid goal of determining civil tax liability, for evidence of tax fraud does not lead inevitably to prosecution.[6]

Schennault and Burman argue that *Donaldson* does not control their case because the involvement of other agencies of the Government in their investigation calls instead for the application of certain language in *Abel* v. *United States,* 362 U.S. 217 (1960).[7] The citation in inapposite. The administrative arrest warrant in *Abel* did not require judicial enforcement, as does an IRS summons. The evidence of collusion between two agences for improper purposes in

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[6]As the Supreme Court noted in *Donaldson,* 400 U.S. at 535 n.17, only half of the full-scale tax fraud investigations undertaken in 1969 led to recommendations for prosecution. The investigations which did not lead to such recommendations resulted in deficiencies and penalties of $20 million earmarked for civil collection.

[7]"The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." 362 U.S. at 226.

*Abel* was much stronger than any evidence on the record in this case. Nevertheless, the Supreme Court affirmed Abel's conviction.

In this case, the strongest inference that can be drawn from the record in appellants' favor is that BNDD caused IRS to begin the investigation of Schennault. There is not the slightest evidence that BNDD had anything to do with the issuance of the summonses for the production of corporate records. The district court specifically found probable cause to suspect that the corporation incorrectly avoided the payment of taxes either in claiming a net operating loss carryover in 1968 or in failing to file a return in a previous year. This finding is more than sufficient to rebut any inference of bad faith in the issuance of the summonses.

Appellants' final objections, which Schennault and Burman raise with particularity and Zenoff adverts to, are to the truncated nature of the evidentiary hearings and pretrial discovery. Zenoff did not seek pretrial discovery, nor did he object to the manner in which the district court conducted the hearing. It is clear that the district court's ruling was akin to a grant of summary judgment upon its finding that "there is no evidence or allegation with respect to those factors that might bear on the presence or absence of good faith." In accepting as true the allegations in Zenoff's answer to the petition for enforcement, the district court was not required to accept his conclusory statement that Agent Levin's "sole purpose in joining the investigation and in participating in it [was] to seek to obtain evidence leading to a possible prosecution of a criminal charge." This is true because the particular facts pleaded did not support the conclusion and because the

statement, in its reference to the purpose of the agent in joining the overall investigation, did not relate directly to the purpose for the issuance of the summonses in question.

The limitation of Schennault and Burman's pretrial discovery was well within the district court's discretion under applicable case law.[8] We find no abuse in its exercise.

Since neither district court specifically ruled on the propriety of compelling the individual appellants to testify in response to the summonses, we merely note that the cases[9] hold that objection must be made to particular questions at the time when they are asked and that the possibility that objectionable questions will be asked does not excuse failure to appear in response to a summons for the purpose of giving testimony.

For the foregoing reasons, it is ordered and decreed that the orders appealed from be and they are hereby affirmed.

AFFIRMED.

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[8] *Donaldson* v. *United States*, 400 U.S. 517, 528-529 (1971); *United States* v. *Turner*, 7 Cir., No. 73-1193, slip opinion at 4-6 (June 12, 1973); *United States* v. *Wall Corp.*, D.C. Cir., 475 F.2d 893, 895 (1972); *United States* v. *National State Bank*, 7 Cir., 454 F.2d 1249, 1252 (1972); *United States* v. *Bell*, 9 Cir., 448 F.2d 40, 42 (1971).

[9] *United States* v. *Ellsworth*, 9 Cir., 460 F.2d 1246, 1248 (1972); *United States* v. *Bell*, 9 Cir., 448 F.2d 40, 42 (1971); *United States* v. *Roundtree*, 5 Cir., 420 F.2d 845, 852 (1969); and cases cited in *id.* at 852 n.18; *In re Partridge*, S.D.N.Y., 59-1 U.S. Tax Cas. ¶ 9291 (1959). The same procedure is the proper one for raising the claimed attorney-client privilege. *Colton* v. *United States*, 2 Cir., 306 F.2d 633, 639 (1962), cert. denied, 371 U.S. 951 (1963).